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Landlord Premises Liability: Establishing Rational Boundaries

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LANDLORD PREMISES LIABILITY: ESTABLISHING RATIONAL BOUNDARIES

I. INTRODUCTION

A landlord's immunity from tort liability was equitable at common law if the lease was viewed as a conveyance of land.[1] However, the evolving nature of the lease requires a more egalitarian principle that shifts more of the burden of premises liability to the landlord. The modern tenant in our urbanized and highly technical society expects his lease to include a "well known package of goods and services," along with the landlord's implied warranty that the dwelling is, and will continue to be, habitable.[2] Although California courts have diminished the landlord's traditional shield against

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1. Siegel, *Is the Modern Lease a Contract or a Conveyance — A Historical Inquiry?*, 52 U. DET. J. URB. L. 649, 652 (1975).

2. Green v. Superior Court, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974). The court stated:

> Modern urbanization has not only undermined the validity of utilizing general property concepts in analyzing landlord-tenant relations, but it has also significantly altered the factual setting directly relevant to the more specific duty of maintaining leased premises. . . . Contemporary urban housing and the contemporary tenant stand in marked contrast to this agrarian model. . . .
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> First, the increasing complexity of modern apartment buildings not only renders them much more difficult and expensive to repair than the living quarters of earlier days, but also makes adequate inspection of the premises by a prospective tenant a virtual impossibility. . . .
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> Second, unlike the multiskilled lessee of old, today's city dweller has a single, specialized skill unrelated to maintenance work. . . . In addition to these significant changes, urbanization and population growth have wrought an enormous transformation in the contemporary housing market, creating a scarcity of adequate low cost housing in virtually every urban setting. . . .
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> These enormous factual changes in the landlord-tenant field have been paralleled by equally dramatic changes in the prevailing legal doctrines governing commercial transactions. Whereas the traditional common law "no duty to maintain or repair" rule was steeped in the caveat emptor ethic of an earlier commercial era, modern legal decisions have recognized that the consumer in an industrial society should be entitled to rely on the skill of the supplier to assure that goods and services are of adequate quality. . . .
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> It is just such reasonable expectations of consumers which the modern "implied warranty" decisions endow with formal, legal protection.

Id. See also Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974).

premises liability if a tenant has possession of the premises,[3] nevertheless, problems remain.

Suppose, for example, that a landlord leases an apartment and discloses the existence of a crack in the tread of the stairs to the tenant, or this obvious defect arises during the lease period but the tenant fails to notify the landlord. If the tenant is subsequently injured by the defect, the landlord can be held liable. However, the extent of such liability is unclear under the present law.[4] As a result of the tremendous upheaval in traditional landlord-tenant relations, the courts and legislature face the difficult problem of reconstructing an equitable doctrine which will protect tenants without completely eradicating landlord protections against premises liability. Present case law[5] suggests that because a breach of the warranty of habitability may constitute a tort action, the solution lies at the point of confluence between contract warranty theory and tort liability.[6] As yet, no single legal basis for a solution has proven sufficient.

One possible solution is to hold the landlord liable in tort under the general negligence statute for tenant or third party injuries which occur on the premises.[7] Under this approach the landlord is

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3. *See, e.g.*, Golden v. Conway, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976) (landlord held liable in tort for maintaining a known dangerous condition); *Green*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (landlord held to impliedly warrant in all residential leases that the premises will be free from all defects which render a premises unfit).

4. *See* Becker v. IRM Corp., 38 Cal. 3d 454, 464-67, 698 P.2d 116, 126-28, 213 Cal. Rptr. 213, 223-25 (1985) (court explicitly limited the extension of strict liability to landlords for latent defects which exist at the time a residential dwelling leases). The hypothetical was extracted from the RESTATEMENT (SECOND) OF PROPERTY § 17.1 illustration 5 (1977). The Restatement generally provides the following resolution to the problem: "any duty to inspect problems of this nature rests equally on [tenant] as on [landlord]. [Landlord] would not be liable for injuries caused by the crack under the rule in this section." The Restatement suggests that where the landlord discloses the existence of the defect to the tenant upon leasing, he may be subject to liability under the negligence doctrine if the condition can be considered a violation of an implied warranty of habitability or a duty created by statute or administrative regulation. *See* RESTATEMENT (SECOND) OF PROPERTY § 17.5 comment d, § 17.6 comments b-d (1977).

Prosser states that "[t]he jurisdictions which find a tort duty usually construe the lessor's covenant, in the absence of an express provision to the contrary, to mean merely that he must repair only within a reasonable time after he has been notified of the dangerous condition, or has otherwise discovered it." W. PROSSER, LAW OF TORTS 410 (4th ed. 1971).

5. *See infra* notes 18-39 and accompanying text for present case law.

6. *See infra* notes 18-39; *see also* Evans v. Thomason, 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977); *Green*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

7. CAL. CIV. CODE § 1714 (Deering 1985). The statute provides that:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by

liable for all foreseeable injuries occurring on the leased premises, even if the landlord has no control over the item causing the injury.[8] Yet, most significantly, it becomes apparent that the negligence principle places an onerous burden upon an innocent tenant if an injury occurs on the premises as the result of a latent, unforeseeable and undiscoverable defect.

A recent alternative approach adopted by the California Supreme Court in *Becker v. IRM Corp.*[9] attempts to resolve this problem by holding the landlord strictly liable for injuries sustained due to latent defects. This theory provides a greater measure of protection to the tenant,[10] and moves toward a more predictable and fair system.[11] However, theoretical and pragmatic problems exist under the strict liability doctrine.[12] For example, if discoverable defects on the premises arise during the lease period and the landlord is not given notice, it is unduly harsh to place the burden of liability solely upon the landlord.[13]

This comment sets out a rational doctrine which will firmly and predictably establish the dimensions of a landlord's premises liability

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want of ordinary care, brought the injury upon himself. The extent of liability in such cases is derived by the title in compensatory relief.

Id.

8. RESTATEMENT (SECOND) OF PROPERTY §§ 17.3-.5 (1977). *See also* Brennan v. Cockrell Investments, Inc., 35 Cal. App. 3d 796, 111 Cal. Rptr. 122 (1978); *Evans*, 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977); Minoletti v. Sabini, 27 Cal. App. 3d 321, 103 Cal. Rptr. 528 (1972). For a discussion of the disadvantages of a complete reliance on this system, see *infra* notes 100-04 and accompanying text.

9. *Becker*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

10. For a summary of the strict liability approach, see generally Prosser, *The Attack Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). *See also* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Green*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704; *Becker*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

11. *See* Browder, *The Taming of a Duty — The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982); *see also* Becker v. IRM Corp., 38 Cal. 3d 454, 464, 698 P.2d 116, 126, 213 Cal. Rptr. 213, 223, (1985).

12. *See infra* notes 41-99 and accompanying text.

13. For a discussion of the notice requirement in strict liability, see *infra* notes 84-87 and accompanying text. The notice element cannot be divorced from any realm of landlord-tenant relations. A tenant is required to give notice to the landlord of defective conditions which exist on the premises to recover in contract (e.g. under the warranty of habitability). Where the defect is undiscoverable and the tenant by definition did not (and was not able to) give notice, the tenant cannot recover in contract. Strict liability is now applicable in these situations. Alternatively, where a defect is blatantly discoverable, the question of notice should not be disregarded, for just as the inability to give notice triggers different means of recovery in tort, the ability to give notice should limit a tenant's means of recovery. *See generally* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 19 WIS. L. REV. 150 (1975).

in California. In establishing these boundaries, this comment will provide tenants with a means of recovery for physical and mental injuries in tort which result from defective premises. Section II examines the historical basis supporting the extension of the warranty of habitability into tort liability. Section III, a call for moderation, proposes that the landlord be held strictly liable in all circumstances except where a patent defect arises after the premises is leased. Finally, section IV provides an alternative theory of recovery for situations in which the tenant cannot recover under strict liability theory.

II. HISTORICAL BASIS FOR THE EXTENSION OF THE WARRANTY OF HABITABILITY INTO TORT LIABILITY

A. *A Landlord's Duty at Common Law*

At early common law, a landlord was immune from tort liability for injuries resulting from defects on the premises.[14] The rationale underlying this rule was that a tenant received an interest in the land and thus was in control of the land. The landlord retained only a reversionary interest and had no right to enter the premises until the lease expired.[15] Consequently, courts held that the landlord was under no duty to the tenant.[16]

The harsh results of this rule in cases involving tenants and other persons who were injured on the premises caused the courts to create several judicial exceptions.[17] Until 1968, California courts consistently denied recovery for injuries sustained on the premises unless one of the exceptions applied.

B. *Emergence of the Implied Warranty of Habitability and its Impact on Tort Liability: Green v. Superior Court*

In *Green v. Superior Court*,[18] the California Supreme Court

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14. *See* PROSSER, THE HANDBOOK OF THE LAW OF TORTS 399 (4th ed. 1971); TIFFANY, THE LAW OF REAL PROPERTY 104 (3d ed. 1939).

15. PROSSER, *supra* note 14, at 400.

16. *See, e.g.*, Brewster v. DeFremery, 33 Cal. 341, 347 (1867) (wall of tenant's dwelling crumbled and crushed tenant to death).

17. These exceptions fit into the following six categories: 1) when the landlord is aware of a concealed defect existing on the premises at the time the tenant takes possession; 2) when the landlord covenants in the lease to repair the premises; 3) when the injury occurs in a common area over which the landlord maintains control; 4) when the premises are to be used for a public purpose; 5) when the landlord negligently repairs the premises; and 6) when a statutory duty to repair exists. *See* PROSSER, *supra* note 14, at 399; POWELL, 2 POWELL ON REAL PROPERTY 234 [2] (1973); RESTATEMENT (SECOND) OF TORTS §§ 358-62 (1973).

18. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

adopted the *Hinson v. Delis*[19] ruling which imposed a warranty of habitability in all residential leases as a matter of law. The *Green* court defined the scope of the warranty as follows:

> Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligation under the common law implied warranty of habitability we now recognize. [20]

While the courts created a remedy for tenants, the Legislature provided a statutory framework for breaches of the implied contractual relationship between the landlord and the tenant. The "repair and deduct remedy" provided in California Civil Code sections 1941,[21] 1941.1,[22] and 1942[23] essentially places the duty of mainte-

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19. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). In *Hinson*, the plaintiff was allowed to withhold rental payments when the landlord failed to make the repairs she requested on her weakened, rotting bathroom floor.

20. *Green*, 10 Cal. 3d at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718 (footnotes omitted).

21. CAL. CIV. CODE § 1941 (Deering 1985). This section provides:

> The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine.

Id.

22. CAL. CIV. CODE § 1941.1 (Deering 1985). This section provides:

> A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics:
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> a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
>
> b) Plumbing or gas facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.
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> c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
>
> d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.
>
> e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working

nance and repair upon lessors of residential property in the absence of contrary agreement. The landlord must make the premises habitable and repair all subsequent dilapidations "which render it untenantable," except those caused by the tenant's negligence.[24] To recover under California Civil Code section 1942, a tenant must give notice of dilapidations and, if the landlord does not repair them within a reasonable time, the tenant may elect to either make the repairs himself and deduct the cost from the rent, or may abandon the premises and no longer be required to pay rent or perform other obligations.[25]

These statutory provisions were not intended by the Legislature

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order.

f) Building, grounds and appurtenances at the time of commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin;

g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.

h) Floors, stairways, and railings maintained in good repair.

Id.

23. CAL. CIV. CODE § 1942 (Deering 1985). This section provides:

a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any twelve-month period.

b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from repairing and deducting after a shorter notice if all the circumstances require shorter notice.

c) The tenant's remedy under subdivision (a) shall not be available if the condition was caused by the violation of Section 1929 or 1941.2.

d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

Id.

24. Stoiber v. Honeychuck, 101 Cal. App. 3d 903, 925, 162 Cal. Rptr. 194, 205 (1980).

25. CAL. CIV. CODE § 1942 (Deering 1985).

to be the exclusive remedy and do not foreclose other types of tenant action. As stated in *Green*, "the statutory remedies of section 1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights."[26] Although the court emphasized that it did not wish to inhibit common law growth in this field, it did not specifically address the issue of damages for tortious injury. Such injury includes discomfort, annoyance, mental anguish, personal property damage or personal injury, resulting from the breach of warranty of habitability. The court ignored the possible relationship between warranty and premises liability and also failed to impose tort liability upon the landlord for breach of the warranty of habitability. However, the subsequent statutory creation of landlord responsibilities in contract laid the foundation for recognition of such tort remedies.

C. *Emergence of the View that a Breach of the Warranty Gives Rise to Tort Liability*

A tort cause of action can be brought coincidentally with, or wholly independent from, a suit for a breach of the implied warranty of habitability.[27] Since the suit for a breach of the implied warranty is essentially a contractual one, this cause of action is by definition independent from a tort cause of action. The fact that tortious acts occur during the performance of a duty created by a contract, however, does not negate the tortious nature of a landlord's liability. The same act may be both a tort and a breach of contract. Even where there is a contractual relationship between the parties, a cause of action in tort may sometimes arise from the negligent performance of a contractual duty. As one court has stated, "a tort may grow out of or be coincident with a contract."[28] In other contexts, the existence of a contractual relationship does not immunize a tortfeasor from liability for his wrongful acts in breach of the contract.[29] This logic simi-

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26. *Green*, 10 Cal. 3d at 630, 517 P.2d at 1177, 111 Cal. Rptr. at 713.

27. *Stoiber*, 101 Cal. App. 3d 903, 162 Cal. Rptr. 194.

28. Bayuk v. Edson, 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49, 56 (1976) (breach of an oral contract for architectural services in connection with construction of plaintiff's home).

29. *Id.* at 309, 46 Cal. Rptr. at 49. For example, the principal and agent relationship is one context in which a tortfeasor-agent cannot escape liability simply because a contract between the principal and the plaintiff existed. The general rule that an agent is not liable in an action based on contract brought by a third person where the fact of emergency and name of the principal has been disclosed is applicable when a statute imposing liability on one assuming to act as an agent for his wrongful acts in the course of his agency is not involved. However, *Bayuk* held that an agent who has committed a tortious act while acting under authority of his principal becomes liable as a result of the contract.

larly applies in the landlord-tenant context.

Moreover, a breach of the warranty of habitability can itself support a tort cause of action.[30] The proposition that the warranty of habitability extends into tort liability is founded upon an extension of the internal logic of three significant cases: *Rowland v. Christian*,[31] *Evans v. Thomason*,[32] and *Stoiber v. Honeychuck*.[33]

1. *Expansion of Rowland into the Warranty Realm*

The implied warranty of habitability could serve as the basis of tort liability, since the courts expanded the *Rowland* rationale to impose upon the landlord a duty to provide housing which does not subject the tenant to an unreasonable danger of harm. In *Rowland*, the supreme court stated with regard to the landlord's traditional immunity:

> Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of a statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code [or some other reason clearly supported by public policy], no such exceptions shall be made.[34]

Thus, the traditional trespasser-licensee-invitee classification of duties of an owner or possessor of land and occupier of land was discarded.[35] The court held that the historical justifications for the

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30. *See, e.g.*, *Stoiber*, 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980).

31. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

32. 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977).

33. 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980).

34. 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100. *See also* 3 WITKIN, SUMMARY OF CAL. LAW § 453A, at 279-80 (8th ed. 1984 Supp.).

35. *See Rowland*, 69 Cal. 2d at 116, 443 P.2d at 568, 70 Cal. Rptr. at 108. The court stated that:

> These classifications were: a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest . . . who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings between them.
>
> Although the invitor owes the invitee a duty to exercise ordinary care to avoid injuring him, the general rule is that a trespasser and licensee or social guest are obligated to take the premises as they find them insofar as any alleged defective condition thereon may exist, and that the possessor of the land owes them only the duty of refraining from wanton or willful injury. Through this semantic the common law has moved unevenly and with hesitation towards imposing on owners and occupiers a single duty of reasonable care in all

traditional common law distinctions, and for traditional landlord immunity as a result of those distinctions, are not justified in our modern society.[36] The landlord was found to be responsible (as is everyone) "for an injury caused to another by want of ordinary care or skill in the management of his property."[37] In essence, after the abolition of the traditional landlord immunity from premises liability, a cause of action in tort could be supported by a breach of the warranty of habitability.

2. *Evans v. Thomason: An Implicit Extension of the Warranty of Habitability in Tort Liability*

Support for the extension of the warranty of habitability into tort liability appears clearer in *Evans v. Thomason*.[38] The tenants on at least two occasions in *Evans* notified the landlords that the kitchen outlet was defective, and the landlords admitted knowledge of the existing danger. The court held the landlords did not exercise ordinary care in the management of their property, and the landlords therefore violated their statutory duty under the general negligence statute.[39] The court implicitly acknowledged that the breach of the warranty of habitability supported the tort cause of action. The court implied that an action could lie in tort because evidence of the breach of the warranty of habitability supported the negligence suit; the standard of care was implicitly the breach itself. After *Evans*, the courts needed to make only one small explicit theoretical leap to permit tenant recovery in tort when the warranty of habitability had been breached.

3. *Stoiber v. Honeychuck: An Explicit Leap into Tort Liability*

In *Stoiber v. Honeychuck*,[40] the court stated that, "[Civil Code section] 1714 may be used as a springboard for a tenant's negligence action against his landlord for failure to maintain the premises in a

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circumstances.

Id.

36. *See generally* Hansen v. Richey, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965); Miller v. Desilu Productions, Inc., 204 Cal. App. 2d 160, 22 Cal. Rptr. 36 (1962).

37. *Rowland*, 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. For a discussion of the negligence doctrine, see *infra* notes 108-11 and accompanying text.

38. 72 Cal. App. 3d 978, 140 Cal. Rptr. 525 (1977).

39. *Id.* at 985, 140 Cal. Rptr. at 529.

40. 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980).

habitable condition."[41] *Stoiber* explicitly stands for the proposition that tort remedies are available to tenants who suffer physical or mental injuries as a result of a violation of Civil Code section 1941.

III. Strict Liability Cause of Action for a Breach of Warranty

In *Becker v. IRM Corp.*,[42] the California Supreme Court articulated the standard that in the personal injury context, California does support a strict liability cause of action for landlord premises liability in limited circumstances.[43] But the court refused to determine "whether strict liability would apply to a disclosed defect,"[44] or "whether the landlord is strictly liable for defects in the property which develop after the property is leased."[45] The court implicitly indicated that salient factors which aid in an examination of strict premises liability revolve around the type of defect involved and the temporal occurrence of the defect. Accordingly, the following four categories can be construed to resolve the questions which remain open in light of *Becker*: (1) latent defects existing at the time the property leases; (2) patent/disclosed defects existing at the time the property leases; (3) latent defects arising after the property leases; (4) patent defects arising after the property leases. Since *Becker* creates a stricter rule of general tort liability for the landlord, it is important that care be taken in determining its scope through a clear delineation of these categories.

A. *Latent Defects Existing at the Time the Property Leases: Becker v. IRM Corp*

The general rule of non-liability of the landlord for physical harm due to a latent (undiscoverable) defect on the leased premises rests on the common law foundation. First the lease is analogized to a sale of the leased property for a term and then the doctrine of caveat emptor is applied to that transaction.[46] The current dissatisfaction with the maintenance of this preferred status under the law has most recently been expressed in *Becker*.[47] The landlord was held

41. *Id.* at 925, 162 Cal. Rptr. at 205.
42. *Becker*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).
43. *Id.* at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.
44. *Id.* at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4.
45. *Id.* at 467 n.5, 698 P.2d at 124 n.5, 213 Cal. Rptr. at 221 n.5.
46. *See* RESTATEMENT (SECOND) OF PROPERTY § 17, introductory note (1976).
47. *Becker*, 38 Cal. 3d at 457, 698 P.2d at 119, 213 Cal. Rptr. at 219.

responsible for all undiscoverable conditions arising prior to leasing.

In *Becker*, the plaintiff resided in a 36-unit apartment complex owned by the IRM Corporation. The plaintiff was seriously injured when he slipped and fell against the untempered glass shower door in his apartment. If the shower door had been made of tempered glass, the risk of serious injury would have been reduced. Prior to plaintiff's accident, only five showers in the complex had shower doors of tempered glass. After the accident, the thirty-one shower doors of untempered glass were replaced with tempered glass. The court held defendant strictly liable for the defective shower door, an "undiscoverable defective condition," which existed at the time of leasing.[48]

The *Becker* court relied primarily upon the strict liability doctrine established in the landmark case of *Greenman v. Yuba Power Products Inc.*,[49] and upon cases in the landlord-tenant realm that found the strict liability doctrine to include landlords.[50] In *Greenman*, the court announced that "a manufacturer is strictly liable in tort when an article he places in the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[51] This holding was based on public policy which demands that the manufacturer bear the risks of injuries caused by its defective products. The court in *Becker* indicated that the strict liability doctrine could be applied in the landlord-tenant context if the stream of commerce marketing chain was extended beyond the manufacturer and retailer of products to the landlord. The court held that the strict liability doctrine does not depend upon whether the articles under the court's scrutiny are leased or sold in large quantities or amounts. Instead, the doctrine depends upon whether the article, such as a dwelling which is leased, is placed on the market.[52] Now, even a landlord who places only one apartment on the market may be within the stream of commerce and therefore subject to strict liability.[53] The purpose underlying this harsh rule is two-fold: (1) to insure that the costs of injuries resulting from a defective condition are borne by the landlord who put the products (the dwelling) on the market rather than by the injured persons and (2)

48. *Id.*
49. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
50. *Becker*, 38 Cal. 3d at 460, 698 P.2d at 119, 213 Cal. Rptr. at 216.
51. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
52. *Becker*, 38 Cal. 3d at 462-64, 698 P.2d at 120-22, 213 Cal. Rptr. at 217-19.
53. *Id.*

to spread the costs of compensation throughout society.[54]

The policy arguments articulated in *Becker* and in the cases dealing with the creation of the warranty of habitability echo the policy arguments accepted in *Greenman*, and indicate that courts in certain factual settings are predisposed to impose strict liability upon landlords.[55] The California Supreme Court has observed that the average modern-day tenant is no different from any other consumer of goods.[56] Through a residential lease, a tenant seeks to purchase housing from a landlord for a specified period of time. This is consistent with the *Greenman* reasoning that ordinary purchasers of goods are at a complete disadvantage in the marketplace and that manufacturers should therefore be held strictly liable.

The *Becker* court considered the economic advantages available to landlords that justify placing the cost of injuries on landlords.[57] The landlord receives the financial benefit from the tenant's use of appliances included in rental housing, and has the ability to spread the cost of compensation throughout the marketing system by obtaining insurance or otherwise accounting for the risk of loss.[58] The majority concluded that landlords do not bear an onerous burden with the acceptance of strict premises liability because they can pass on the increased costs to their tenants. In areas where rent control has been implemented, the landlord, through the doctrine of strict liability, is forced to bear the burden of the risk of loss alone.[59] But the landlord can better afford insurance to cover the risk of loss than the tenant.

The *Becker* court recognized that, as in products liability, strict liability provides a financial incentive to reduce the level of accidents below that which would exist under other tort doctrines.[60] Imposing

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54. *Id.* at 477, 698 P.2d at 131, 213 Cal. Rptr. at 228.

55. *Green*, 10 Cal. 3d at 623-28, 517 P.2d at 1172-76, 111 Cal. Rptr. at 708-12. The court stated the policy considerations in the creation of the warranty of habitability. The court made reference to the problems that plague all consumers when the warranty of habitability has been breached including inadequate opportunity to inspect the premises, inferior bargaining power, and insufficient knowledge to conduct an informed inspection even when the opportunity is available. *Id.*

56. *Id.* at 627, 517 P.2d at 1175, 111 Cal. Rptr. at 711.

57. 38 Cal. 3d at 454, 698 P.2d at 116, 213 Cal. Rptr. 213.

58. *Id.*

59. *Id.*

60. *Id.* at 487 n.6, 698 P.2d at 139 n.6, 213 Cal. Rptr. at 236 n.6. But, as the partially dissenting opinion in *Becker* suggests, landlords may ultimately frustrate the twin policy goals underlying the application of strict premises liability because they may never bear the risk through the absorption of increased insurance costs. The dissent states:

> The majority never considers the economic effect of its holding. The only logical result is that the price of rental housing will increase because of the increased

accident costs on landlords who fall within the stream of commerce creates an incentive for landlords to avoid accidents where the cost of avoidance is less than the cost of potential accidents involving litigation costs and high awards to injured plaintiffs.[61] Thus, once landlords have been included within the stream of commerce, and once landlords are thereby subject to strict liability, landlords will be forced to evaluate the desirability of placing residential dwellings on the commercial market. This evaluation will reduce the risk of future accidents.

B. *Patent/Disclosed Defect Existing on Premises at the Time of Leasing*

The *Becker* decision left open the question of whether a landlord could be held strictly liable for an obviously defective (disclosed) condition which a tenant could encounter at the time a dwelling is leased.[62] But, the court continued to draw upon the products liability analogy by indicating through an immediate reference to *Luque v. McLean*,[63] that the application of strict liability in such a circumstance need not support the tenant's claim.[64]

In the products liability context, the *Luque* court upheld its disavowal of any latent-patent distinction in the doctrine of strict liability at the time the product leaves the manufacturer's hands.[65] The court cited the language in *Greenman* stating: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using [the product] . . . as a result of a defect . . . of which plaintiff was not aware."[66] Consequently, California appellate courts suggested that *Greenman* requires that only a latent

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cost of insurance, assuming insurance can be obtained for this purpose. Even if landlords can sue participants in the original line of manufacture and marketing, the litigation costs involved will likely also have an effect on the price of rental housing. Arguably, instead of risk distribution, the majority's conclusion will result in a general increased cost attributable to the risks involved without a concurrent benefit. Someone will have to pay for the additional litigation today's decision is likely to create.

Id. Tenants impliedly will absorb the additional costs.

61. *Id.*

62. *Becker*, 38 Cal. 3d at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4. The court states: "We do not determine whether strict liability would apply to a disclosed defect. (*See* Luque v. McLean, (1972) 8 Cal. 3d 136, 141-146, 104 Cal. Rptr. 443, 501 P.2d 1163.)" *Id.*

63. 8 Cal. 3d at 141-46, 501 P.2d at 448-53, 104 Cal. Rptr. at 1168-73.

64. *Becker*, 38 Cal. 3d at 464, 698 P.2d at 122, 213 Cal. Rptr. at 219.

65. 8 Cal. 3d at 141-46, 501 P.2d at 448-53, 104 Cal. Rptr. at 1168-73.

66. *Id.* at 141, 501 P.2d at 1167, 104 Cal. Rptr. at 447.

defective condition would permit recovery under strict products liability theory.[67] But, the California Supreme Court in *Luque* examined the perplexing excerpt in *Greenman* and concluded that it was not intended to include the essential elements of the products liability case. Rather, the *Luque* court suggested that proof of the latency of a defect is sufficient only to impose strict liability upon a manufacturer.[68] The court stated that "[n]owhere in that formulation was it stated that the injured plaintiff has the burden of proving he was not aware of the defect."[69]

The *Price v. Shell Oil Company* decision,[70] which heralded the inception of strict premises liability, did not consider the latent-patent distinction to be vital. Strict liability in tort was extended to bailors and lessors of personal property who are engaged in the business of leasing, where a product defect exists at the time of such leasing. "The paramount policy to be promoted . . . is the protection of otherwise defenseless victims of manufacturing defect."[71] No substantial difference exists between the seller of personal property and the lessor of such property. The court reiterated the *Greenman* language that a plaintiff need only prove the defect causing injury resulted from the article a manufacturer placed in the stream of commerce.[72] The troubling language of *Greenman*, which requires that a plaintiff prove the existence of a latent defect, was not identified as the formulation of strict liability law. Although the defect was latent, the plaintiff in *Price* did not have the burden of proving that he was unaware of the defect. The court would presumably treat latent and patent defects equally once the stream of commerce test was met.

The courts adopted the *Greenman* broad stream of commerce test in the application of strict premises liability in virtually all cases to not require proof that the plaintiff was unaware of the defect at the time of leasing. For example, in *Fakhoury v. Magner*,[73] the

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67. *See* Bennett v. Int'l Shoe Co., 275 Cal. App. 2d 797, 798, 80 Cal. Rptr. 318, 319 (1969); Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 639, 52 Cal. Rptr. 679, 680 (1969).

68. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443.

69. *Id.*; *see also* Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1971) (supervisor standing behind a pay-dozer was killed when the operator reversed the vehicle; the operator's vision was impaired by a blind spot created by a patently defective condition of a large engine box placed behind the operator's seat). The court stated that "even if the obviousness of the peril is conceded the modern approach does not preclude liability solely because the danger is obvious." *Id.* at 473-74, 467 P.2d at 239-40, 85 Cal. Rptr. at 639-40.

70. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

71. *Id.* at 251, 466 P.2d at 726, 85 Cal. Rptr. at 182.

72. *Id.*

73. 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972).

lessee of a furnished apartment was injured when the couch supplied by her landlord collapsed under her. The lessee sued under strict liability theory. The court concluded that the landlord was strictly liable as a commercial lessor of the defective furniture rather than as a lessor of personal property. Strict liability in tort was extended to a landlord who provided an apartment with furniture. The landlord in *Fakhoury* was considered a vital link in the chain of commerce.[74] The latent-patent distinction was not addressed.

The case of *Golden v. Conway*[75] represents additional support for the proposition that the latent-patent distinction of a defect existing in a dwelling at the time of leasing is not vital. The court extended the doctrine of strict liability in the non-residential context to a landlord who supplied and installed, through an independent contractor, a defective wall heater in an unfurnished apartment. The court relied upon *Greenman* in holding that a landlord should be considered a "supplier of a commodity" (i.e. an apartment).[76]

Courts have not examined the situation where a tenant suffers physical injury because of an obvious or disclosed peril in existence on the premises at the time of leasing. However, a court is not likely to preclude landlord liability solely because of the type of defect. The California Supreme Court indicated in *Becker* that the products liability analogy must be drawn through consideration of the *Luque's* court refusal to limit liability to cases involving latent defects. The strict premises liability case law suggests the courts are already predisposed to disavow the latent-patent distinction and will impose liability upon landlords for pre-existing obvious defects.

The impact of the policy underlying the doctrine of strict premises liability would be severely reduced if recovery were to be limited. The purpose of the application of the doctrine in the landlord-tenant context is to insure that the costs of injuries resulting from unfit dwellings are to be borne by the landlord who put the dwelling on the market rather than by the powerless tenant. To hold otherwise would force a tenant to accept an unfit dwelling while permitting a callous landlord who has disclosed a defect at the time of leasing to immunize himself from liability. Yet, such a conclusion does not foreclose modification of strict premises liability in other contexts.

Leased premises are theoretically distinct from products when

74. *Id.*
75. 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976).
76. *Id.*

patent defects arise after leasing. Although strict premises liability is established through analogies between premises and products, the fact that strict liability is frequently applied in products liability cases does not mandate the wholesale adoption of the doctrine in the premises liability context. The *Becker* court cautioned that "the landlord is not an insurer" of the tenant's safety and the landlord must not be placed in such a position through the use of strict liability.[77] The court implicitly asserted that premises liability may be treated differently than products liability by omitting any reference to the analogy between the two areas.[78]

Finally, in analogizing between strict products liability and strict premises liability, the "unawareness of the defect" language in the troubling *Greenman* case provides a defense for the landlord. As the court in *Luque* stated "it declares in effect that a person urging strict liability must not have assumed the risk of the defective product."[79] The defense will consist of a landlord's proof that the tenant voluntarily and unreasonably encountered a known danger. If the tenant assumes the risk, with full appreciation of the danger of a disclosed peril in the dwelling, then the landlord will be relieved of liability.[80]

C. *Latent Defects Arising After the Property Leases*

Whether to impose strict liability for latent defects not known to the landlord and not discoverable upon a reasonable inspection is easily answered after the *Becker* decision. Manufacturers and, more significantly, landlords have been held strictly liable for damage caused by latent defects if the defect existed when the product left the landlord's control.[81] Retailers who did not create latent defects have also been held strictly liable for such defects.[82] Accordingly, a landlord should be strictly liable for latent defects caused by a third party (such as a subcontractor) when the landlord can obtain indemnification from the third party.

Three familiar factors indicate that the landlord should not escape strict liability simply because an undiscoverable defect which caused injury arose after the tenant leased the premises. The twin

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77. 38 Cal. 3d at 473, 698 P.2d at 129, 213 Cal. Rptr. at 226.

78. *Id.* at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4. *See also supra* notes 61-67 and accompanying text.

79. 8 Cal. 3d at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449.

80. *See supra* notes 40-61 and accompanying text.

81. *See supra* notes 43-62 and accompanying text.

82. 8 Cal. 3d at 144 n.8, 501 P.2d at 1169 n.8, 104 Cal. Rptr. at 449 n.8.

policy considerations of accident reduction and allocation of risk to the group which is best able to bear the loss, are as relevant in this context as in circumstances where an injury results from an undiscoverable defect before the premises are leased.

Additionally, since the object of a lease is not the item leased but the enjoyment of the lease item, a lessor's responsibility seems to naturally extend to dwellings regardless of discoverability of the defects. However, this approach is ineffective because Civil Code sections 1941 and 1942 require tenants to give landlords notice before the tenants are permitted to recover for a defective condition.[83] Tenants cannot possibly fulfill this requirement when latent undiscoverable defects are in existence, and the tenants may not recover under this doctrine. Thus, the strict liability doctrine should be made applicable in cases of undiscoverable defects arising after the property leases.

D. *Patent Defects Arising After the Premises Leases*

The most difficult question which remains unanswered in the residential dwelling context, is whether to permit recovery for damages caused by visible defects which result from ordinary wear and tear after a tenant has taken possession of the premises. Strict liability appears to place an onerous burden on the landlord in relation to a tenant's possible irresponsibility. As commentators have noted: "While courts and legislatures can grant all the access [onto the tenant's premises] imaginable, the fact remains that the tenant will spend a great deal more time on the premises than the landlord could or should."[84] The landlord frequently is not in control of the premises but periodically examines the premises for defects. If an obvious defect arises after such inspection of the premises, it is inherently unjust to permit an injured tenant to recover without considering both the tenant's role and when the defect arose.

No products liability precedent exists for barring recovery for patent disclosed defects which have arisen after the lease. However, as the *Becker* dissent indicates, the strict products liability rationale will prevail only if the applicable standards are modified because apartments are not products which are supposed to leave the manufacturers hands in a safe condition.[85] The tenant does not expect that

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83. *See supra* notes 21-25 and accompanying text.

84. Davis & DeLaTorre, *A Fresh Look at Premises Liability as Affected by the Warranty of Habitability*, 59 WASH. L. REV. 141, 179 (1984).

85. 38 Cal. 3d at 486-87, 698 P.2d at 138-39, 213 Cal. Rptr. at 235-36.

all will be perfect in his residential dwelling for all the years of his occupancy.[86] The result is that the landlord will be strictly liable for all the consequences of any deficiency without regard to the timing or discoverability of the defect.[87] In effect the landlord would become an insurer of a tenant's safety in his dwelling.[88] Yet, the *Becker* majority, and all other California cases concerning this issue have explicitly refused to assign this responsibility to the landlord without limitation.[89] The courts have also given little specific guidance as to how to resolve questions concerning patent defects arising during the lease period.

The problem in this area revolves around *notice.* As a general rule, the strict liability doctrine discards notice requirements and thereby permits recovery for undiscoverable defects which ultimately render residential dwellings unfit for human habitation.[90] However, strict liability is too harsh to apply in the context of premises liability without modification. The Legislature has indicated an implicit unwillingness to hold the landlord strictly liable in all situations by requiring a tenant to give notice where a patent defect arises on the premises.[91] The doctrine should not be invoked where a discoverable defect arises on the premises after the tenant has taken possession and the defect is obvious.

Some commentators have asserted that the notice requirement of warranty theory should be rejected altogether because the lease is a

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See, e.g., Greenman*, 59 Cal. 2d at 60-62, 377 P.2d at 899-900, 27 Cal. Rptr. at 699-700.

91. CAL. CIV. CODE § 1954 (Deering 1981). This section provides:

> A landlord may enter the dwelling unit only in the following cases:
> (a) In case of emergency.
> (b) To make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to perspective or actual purchasers, mortgagees, tenants, workmen, or contractors.
> (c) When the tenant has abandoned or surrendered the premises.
> (d) Pursuant to court order.
> Except in cases of emergency or when the tenant has abandoned or surrendered the premises, entry may not be made during other than normal business hours unless the tenant consents at the time of entry. The landlord shall not abuse the right of access or use it to harass the tenant. Except in cases of emergency, when the tenant has abandoned or surrendered the premises, or if it is impracticable to do so, the landlord shall give the tenant reasonable notice of his intent to enter and enter only during normal business hours. Twenty-four hours shall be presumed to be reasonable notice in absence of evidence to the contrary.

Id.

conveyance of a contract and not a conveyance of land. The lease, therefore, contains an implied duty to repair and an implied concurrent duty of the landlord to enter the premises for the purposes of making periodic inspections.[92] Accordingly, these commentators conclude that the tenant is not required to give a landlord notice of the defective condition of the premises, while the landlord should be held responsible for such conditions. This position is unrealistic, harsh, and contrary to a significant line of authority in California.[93]

Other commentators have suggested that: "In all other circumstances (i.e. where a latent defect does not exist), the landlord should be held liable only if he has received notice of the defect from the tenant or if he knew or must have known of the defect due to information acquired from some other source."[94] Requiring the tenant to assume some responsibility seems more equitable and reasonable than requiring the landlord to make frequent intrusive inspections. The landlord should not be liable for conditions known to the tenant which are not communicated to the landlord.[95] Moreover, in California such a requirement would be impracticable. A landlord does not have a right of inspection absent some notice that a problem exists. The rights of a landlord to enter rented premises, set out in California Civil Code section 1954, do not provide a casual right of entry.[96] Any lease provision purporting to grant such a right is void because the prescription of such an entry cannot be waived. Therefore, without some sort of knowledge of facts which would induce a man of ordinary prudence to suspect that a patent/disclosed defect exists, a landlord cannot absolutely guarantee the premises.

Jurisdictions which apply the doctrine of strict premises liability allow a means of escape from wholesale application of the doctrine if patent defects arise after the premises leases. The Louisiana Legislature codified the doctrine by providing that: "The lessor guarantees the lessee against all vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects . . . and even if they have arisen since."[97] But, not every defect causing injury is actionable. Article 2716 of the Louisiana Civil Code makes the lessee/tenant responsible for repair of specifically enumerated defects that occur

92. Davis & DeLaTorre, *supra* note 84.
93. *Id.*
94. *Id.*
95. *Id.*
96. CAL. CIV. CODE § 1954 (Deering 1985).
97. LA. CIV. CODE ANN. art. 2695 (West 1952).

during the continuance of the lease.[98] The tenant is responsible for repairs of defects which customarily result from his use of the premises because the landlord does not have a statutory right to continually enter the premises to repair defects which may potentially cause physical injury.

The approach California courts implicitly take, and which they should explicitly employ where patent/disclosed defects have arisen after the tenant leases the premises, is evidenced in *Evans v. Thomason.*[99] In *Evans*, the tenants brought an action for personal injuries and property damage arising out of an overloaded electrical cord fire. One of the sockets of a kitchen double plug receptacle failed and the tenants substituted a lightweight extension cord to power their freezer and refrigerator. The landlords did not repair the plug and the overloaded cord failed.

In affirming a judgment against the landlords, the court of appeal summarized the facts which created the landlords' duty, and concluded that the landlord was liable.[100] In the negligence context, the court states that "the landlords had notice of the condition" and must be held liable.[101] Similarly, "notice" has been a constant concern of courts applying strict liability in the landlord-tenant context. In *Uccello v. Laudenslayer*,[102] the court of appeal held that a landlord has no duty to inspect the rental premises to discover a tenant's dangerous animal. However, a landlord who has actual knowledge of the dangerous animal and knows of his right to remove the animal, has a duty to terminate the tenancy if the tenant does not remove the dangerous animal from the premises.[103] Presumably, if the tenant has given the landlord notice of the defective condition, the landlord is liable for the defective condition which arises on the premises after the property is leased to third parties. Without such notice the landlord cannot be held liable.

Moreover, in the criminal context, the court of appeal in *Kwaitkowsky v. Superior Trading Company*[104] held that a landlord could be held liable for damages arising from the rape of a tenant, notwithstanding prior identical or even similar events. The landlord had ample notice of facts which should have induced him to take

98. LA. CIV. CODE ANN. art. 2716 (West 1952).
99. 72 Cal. App. 3d at 985, 140 Cal. Rptr. at 532.
100. *Id.* at 985, 140 Cal. Rptr. at 529.
101. *Id.*
102. 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975).
103. *Id.* at 512, 118 Cal. Rptr. at 746.
104. 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).

precautions against criminal attacks by third persons.[105] As the court stated: "The landlord . . . had prior notice of a tenant who was assaulted and robbed two months before Ms. Kwaitkowsky was assaulted, robbed and raped. The landlords had notice that their apartment was in a high crime area and that the lock of the lobby entrance door was defective."[106]

Thus, the doctrine of strict liability has been applied, and should apply, to limited factual situations. The above cases were cited by the *Becker* court to extend the warranty of habitability into strict premises liability, but are inconsistent with the interpretation of *Becker* which permits an unbridled application of strict liability. Yet, the *Becker* court affirmatively extended the warranty of habitability into tort liability, and therefore other tort causes of action can be asserted to permit a tenant redress, while concomitantly affording the landlord a base level of protection.

IV. Alternative Tort Causes of Action

In addition to strict liability, a plaintiff may bring several tort causes of action in some California courts based upon a breach of the warranty of habitability or based upon the existence of dilapidated conditions in a residential dwelling. Alternative paths for recovery where a disclosed/patent defect has emerged after a tenant has leased a dwelling, or where strict premises liability may not apply, include an application of negligence doctrine, nuisance, and negligent infliction of emotional distress.

A. *Negligence and the Implied Warranty of Habitability*

In applying the rationale of *Rowland*, courts have held that the common law duty of care specified in Civil Code section 1714 should be applicable in the premises liability context.[107] As *Rowland* suggests, a departure from the fundamental principle of liability articulated in Civil Code section 1714 "involves a balancing of a number of considerations" including the foreseeability of harm and public policy supporting its application.[108]

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105. *Id.* at 326, 176 Cal. Rptr. at 495.

106. *Id.* at 328, 176 Cal. Rptr. at 497.

107. *See, e.g.*, *Golden*, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976); *Green*, 10 Cal. App. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

108. The *Rowland* court stated that the considerations which should be balanced are: 1) foreseeability of harm to the plaintiff; 2) the degree of certainty that the plaintiff suffered injury; 3) the closeness of the connection between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing

An application of the "reasonable foreseeability" principles in the landlord-tenant context leads to the conclusion that landlords should owe a duty of reasonable care to tenants who suffer injuries on the premises. In a typical rental situation involving a residential dwelling, the foreseeability of harm to a tenant from the landlord's failure to maintain the premises in a habitable condition is apparent. The degree of certainty that the tenant suffered injury and the closeness of the connection between the landlord's conduct and the injury is readily ascertainable by proof in each case. Further, the moral blame attached to the landlord's conduct does not comply with either the habitability requirements articulated in the Civil Code, or the policy of preventing future harm by imposing a duty of reasonable care upon the landlord. Moreover, the imposition of a duty to exercise care with the resulting liability for breach would not unduly extend a landlord's burden because of the availability, cost and prevalence of insurance for the risk involved. Under the policy considerations articulated in *Rowland*, a regard for human health and safety compels the imposition on the landlord a duty of care in the maintenance of the premises.

Accordingly, Civil Code section 1714, which embodies the general reasonable foreseeability test of *Rowland*, has been, and should be, utilized as the standard of care owed by a landlord. Additionally, as Civil Code section 1941 and the housing codes of California were designed to protect the health and safety of tenants, a rebuttable presumption of negligence on the part of the landlord should arise if the tenant proves the landlord violated the statute and the violation proximately caused the injury.[109] This presumption is supported by the fact that Civil Code section 1941 is intended to prevent the same conditions that the general negligence statute in premises liability cases would prevent, while evidence of a breach of the warranty of habitability also supports a negligence cause of action. It would be a ludicrous fiction to not permit the presumption of negligence where Civil Code sections 1941 and 1942 have been violated, for in practicality this is already occurring.[110] The presumption may be rebutted by proof that the landlord did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances,

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future harm, the extent of the burden to the defendant; and 6) consequences to the community of imposing a duty to exercise care with resulting liability for breach, and availability, cost, and prevalence of insurance for the risk involved. *See Rowland*, 69 Cal. 2d at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.

109. *See supra* note 32-38 and accompanying text.

110. *See Stoiber*, 101 Cal. App. 3d at 903, 162 Cal. Rptr. at 194.

who desired to comply with the law.

This expansion of remedies provided by Civil Code sections 1941 and 1942 is justified because, as the court states in *Green*, "the statutory framework has never been viewed as the curtailment of growth of the common law in this field."[111] Thus, both common law and statute support a tenant's negligence action against his landlord for failure to maintain the premises in a habitable condition. Yet, under the negligence doctrine the tenant cannot recover where the tenant has suffered unforeseeable harm, where the landlord has not been negligent in his repairs, and where the tenant suffers no physical or economic damage. Alternative modes of recovery should be resorted to in these different factual settings to facilitate tenant recovery.

B. *Nuisance*

A cause of action for premises liability may also lie in nuisance. Section 731 of the Civil Code specifically authorizes an action by any person whose property is injuriously affected, or whose enjoyment of property is lessened by a nuisance.[112] Civil Code section 3479 defines a nuisance as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."[113] Thus, given that the statutory definition of nuisance appears broad enough to encompass almost any type of interference with the enjoyment or use of land or property, a defective residential dwelling leased out by a landlord should fall within the scope of the nuisance doctrine.[114]

Nuisance liability is not precluded by the existence of a contractual relationship between the tenant and landlord. As the California Supreme Court pointed out in another context, "every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."[115] This duty is independent of the contract and attaches beyond its terms. Thus, tenants may treat the injury to their tenancy as a nuisance or a breach

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111. 10 Cal. 3d at 630, 517 P.2d at 1177, 111 Cal. Rptr. at 713.

112. *Id.*.

113. CAL. CIV. CODE § 3479 (Deering 1985); *See also* PROSSER, LAW OF TORTS 86 (4th ed. 1971). Prosser states: "there is perhaps no more impenetrable jungle in the entire world than that which surrounds the word 'nuisance'. It has meant all things to all men and has been applied indiscriminately to everything."

114. *See* CAL. CIV. CODE § 731 (Deering 1985).

115. *See Stoiber*, 101 Cal. App. 3d at 919, 162 Cal. Rptr. at 201.

of contract (or a breach of the warranty of habitability) at their election. Moreover, a tenancy is a sufficient property interest to give the tenant standing to bring an action based on nuisance.[116]

A nuisance may be an intentional or negligent tort. The most common occurrence within the residential dwelling setting is the former. For example, in *Stoiber* the court indicated that a nuisance cause of action would be upheld where there was knowledge of defective conditions such as the presence of leaking sewage, deteriorated flooring, falling ceiling, leaking roof, broken windows, and other unsafe and dangerous conditions.[117] Such conditions are substantial interferences with the use and enjoyment of the premises, and tenants should be compensated for such losses.

C. *Negligent Infliction of Emotional Distress*

The right to recover for emotional distress without physical injury has been recognized in some California courts in situations involving a landlord's extreme and outrageous conduct directed at his tenant. In general, the modern rule is that there is liability for conduct exceeding all bounds usually tolerated by society.[118] Behavior may be considered outrageous if a landlord: 1) abuses his position which gives him power to damage a tenant-plaintiff's interests; 2) knows the plaintiff is susceptible to injuries through mental distress; or 3) acts intentionally or unreasonably with recognition that the acts are likely to result in illness through mental distress.[119]

Where a landlord has breached the warranty of habitability, and where the tenant has suffered no actual physical injury but has suffered severe emotional discomfort, this cause of action will be applicable.[120] By definition, the landlord, who has been given notice of a defective condition of the premises in these situations, intentionally damages the interests when he refuses to respond to the tenant's cry for help. Moreover, dilapidated conditions on residential premises have been held to severely disturb a tenant's mental state; on this basis a tenant should be allowed to recover. An adoption of this basis for recovery will permit tenants who cannot recover under other theories a means of recompense for their suffering, while not unduly extending any basis of recovery to unfairly burden the landlord.

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116. Jones v. Kelly, 208 Cal. 251, 280 P. 942 (1929).

117. 101 Cal. App. 3d 903, 162 Cal. Rptr. 194.

118. *Id.* at 921, 162 Cal. Rptr. at 202.

119. Newby v. Alto Rivera Apartments, 60 Cal. App. 3d 288, 297, 131 Cal. Rptr. 547, 552 (1976).

120. *Id.*

V. CONCLUSION

Within certain limits a tenant should be permitted to recover in tort from his landlord for the physical or mental injuries he may sustain on the residential premises. A landlord is not an insurer of tenant safety on the premises, and therefore strict liability should not apply where a patent/disclosed defect has arisen on the premises and the landlord has not been given notice of the condition. This proposition is supported by both common law and statutory principles. The twin policy goals of accident reduction and the need to more equitably spread the risk of loss has spurred the California courts to recognize the strict premises liability cause of action in certain circumstances. The doctrine has been adopted statewide in cases where the tenant does not have control over the premises or where an undiscoverable defective condition is present. In different factual settings, such as where the tenant has suffered only emotional distress, alternative tort remedies should be made available to tenants, for the degree of suffering in such circumstances is no less severe simply because it appears to be intangible.

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